IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/10/2003

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THE HONOURABLE MR.JUSTICE A.K.RAJAN

Writ Petition No.13336 of 2000 and Writ Petition No.13337 of 2000

Tamil Nadu Petroleum Dealers Association
(Regd.No.142/80)
rep. by its President
Mr.A.R.Damodaran
8, Rajaji Salai,
Chennai 600 001. ..... Petitioner

-Vs-

1. Union of India
rep. by its Secretary
Ministry of Petroleum and Natural Gas
Govt. Of India, Shastri Bhavan
New Delhi

2. M/s. Indian Oil Corporation Ltd
rep. by its General Manager
Indian Oil Bhavan
Nungambakkam High Road
Chennai 600 034.

3. M/s,Hindustan Petroleum Corporation Ltd
rep. by its General Manager (South)
Thalamuthu Natarajan Building
IV Floor, Gandhi Irwin Road
Egmore, Chennai 600 008.l

4. M/s. Bharath Petroleum Corporation Ltd.
rep. by its General Manager
1, Ranganthan GArden
Off: 11th Main Raod, Anna Nagar
Chennai 600 040

5.M/s. I.B.P.Company Ltd.
rep. by its General Manager
Spur Tank Road
Chennai 600 031. ..... Respondents

Prayer: Petitions filed under Article 226 of the Constitution of

India, praying to issue a writ of mandamus and certiorari, as stated therein.

For Petitioner : Mr.G.Masilamani
Senior Counsel
For M/s.Mani Associates

For Respondents : Mr.V.T.Gopalan
Additional Solicitor General
for Mrs. Meera Gupta for R2
Mrs.Vanthi Srinivasan ACGSC
for R1
Mr.K.Kumar for R.3 to R.5

:ORDER

In both these writ petitions, the parties are the same. W.P.No.13336 of 2000 is for the issuance of a writ of mandamus, to direct the respondents to provide infrastructure facilities to the members of the petitioner's association at their respective dealership petrol bunk to enable them to inspect and ensure the quality and quantity of the product delivered at their petrol bunk through tanker lorries as per delivery document of the Oil Companies and that the quality of the product conforms to the requirement in Schedule-1 of the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractice) Order 1998; and to direct the respondents 2 to 5 Oil Companies, to disclose in their delivery documents the analytical report disclosing the specifications of the petrol/diesel sent through lorry tankers.
2. W.P.No.13337 of 2000 is for the issuance of a writ of certiorari, to call for the records of the first respondent and to quash Clause 3(iii)(b) and Clause 5(1) of the Motor Spirit and High Speed Diesel (Regulation of Supply and Distribution and P ntion of malpractice) Order 1998, in so far as, it requires the members of the petitioner' s Association to ensure that the quality of the product conform to the requirement of Schedule-1 and empowering officers authorised to take sample from "vehicles" and "receptacles" respectively.

3. The contents of the affidavit filed in support of the writ petitions are as follows:
(i) Petitioner association is the Tamil Nadu Petroleum Products Dealers. Its members are engaged in the distribution of petrol and diesel to the public. They are equally interested to supply quality products as the Central Government, Oil Refineries and Oil distributing companies. For that the Government agencies shall acquire the best grade of crude suitable to the various refineries in India. But, the best crude is not received; Oil refineries have shortcomings in the refining technologies; infrastructure facilities and error committed both by human and machines results in substandard products. These substandard products cannot be rectified. But, at the same time, it cannot also be discarded for various reasons. These substandard products are stealthy pressed into distribution system. There cannot be a perpetually unerring system, operated by machines and human

beings. Any proclamation to the contrary by Oil refineries that they unfailingly supply petrol to the specification of Schedule-1 of the 1998 Control Order cannot be true. Such claim is nothing but travesty of truth and it is a farce.

(ii) Oil companies are faced with serious, infrastructure, and procedural shortcomings in the supply system adopted by them. The defects are not rectified by the Oil companies in spite of repeated representations from the dealers. There may be few unscrupulous dealers who indulge in adulteration at their end. But it cannot be generalised and the whole lot of dealers cannot be condemned or blamed and held responsible for failure in the product supplied to them. This is a problem affecting the entire nation.

(iii) The Oil companies get supply from Oil refineries. They get it transported by lorries, rail tankers or through pipelines. The product so received are stored in very large tanks in different parts of the country for ultimate distribution to the dealers through lorry/ tankers. The members of the petitioner's association are dealers of the petroleum products, by virtue of their Dealership Agreement with respondents 2-5. The Dealership agreement is completely one sided and is in favour of the respondents 2-5. The Oil companies are monopoly business of giant size owned and controlled by the Government of India. The Clauses in the agreement are drafted without negotiations with the dealers; dealers have no say in the agreement; either they have to accept it or leave it. The petitioners have no choice but to sign on dotted lines.

(iv) The first respondent by the power conferred under Section 3 of the Essential Commodities Act, 1955, passed "Motors Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention or Malpractice) Order 1998". Schedule-1 prescribes the composition of petrol and diesel; Clause-3(iii) of the Control Order require the Petrol bunk dealers to check and ensure that the petrol received by them correspond to the specification and makes them answerable for the quality. But, no facility and training is given to the petrol bunk dealers to check and ensure the quality. In the State of Delhi, the inspecting officers are required to conduct only the density test at the dealer's petrol bunk. In the event of density test not conforming to the standard prescribed, the inspecting officials should draw samples for analysis of the petrol or HSD for its test at specified laboratories to detect adulteration/failure of the prescribed specifications. That notification was issued taking into consideration the limited facilities provided to the petrol bunk dealers to test the petrol or HSD when they receive the same. The Oil companies have also issued a revised marketing Guidelines in 1998. These guidelines have not been framed under any statute. They are arbitrary, one sided, impracticable, unimplimentable and criminally implicative and punitive; it disregards fair and just procedure and without any adjudicating machinery and are violative of the provisions of the Article 14, 19(1)(g) and 21 of the Constitution of India. The petitioner's association therefore filed W.P.No.10556 of 1998 before this Court challenging the several provisions of the guidelines and it is pending disposal by this Court. After filing of the above writ petition, the 1998 Control Order was issued.

(v) Prima facie there are genuine shortcomings in petrol and HSD distribution procedure; it has to be modified and rectified by investing inputs of capital to provide fool proof infrastructure facilities such as:

(a) Separate lorry and rail tankers for petrol and Diesel.
(b) Separate pipe lines from refineries to Oil Company for Petrol and Diesel.
(c) Foolproof Sealing system; incapable of duplicating and counterfeiting.
(d) Providing apparatuses and gadgets to test the product at the petrol bunk.

(vi) As per the present practice, the tanker compartments which are used for transporting petrol are also used for transporting diesel alternatively; similarly, same pipelines from refineries to oil companies are used for getting products from the refineries to Oil companies such as Benzene, Aviation Turbine, Fuel, Petrol High Speed diesel, Kerosene etc.,. Perfect cleaning before changing over is not possible all times; there is always room for lapses; this adversely affects the quality of the petrol. Since thousands of gallons of petrol products are transferred through these pipe lines, there is always the possibility of admixture of one product with another due to mechanical or human error.
(vii) The non-conformity to the prescribed standards of the petrol and HSD in the hands of a dealer is attributable to various reasons such as: Supply of non-standard/adulterated petrol or HSD by the Oil companies; improper and inadequate maintenance of facilities and equipment at the dealers' bunks such as under ground storage tanks which are not at all cleaned for several years by the Oil companies after installation; Non cleaning of the Lorry and Rail tankers and the use of the same tanker alternatively for transporting petrol and diesel; Easily tampered and duplicatable transport tankers sealing system which cannot be detected by dealer; Pilferage and Robbery of Petrol/ diesel during transit etc.,.
(viii) There are 25 types of malpractice committed by unscrupulous lorry tankers which ultimately expose the dealers to serious consequences such as cancellation of license, prosecution and conviction. In spite of repeated representations of these defects to the Government, no steps have been taken to rectify the system. Oil companies provided with alibis by presuming that they always supply petrol/diesel as per the Schedule-1 of the Control Order. Consequently, the petrol bunk dealer is deemed to be guilty and made answerable for any malpractice. Under 1990 Control Order, the dealers were required to check the colour visually and to do filter paper and density tests on petrol/HSD for the purpose of ascertaining the standard. The Government of Maharashtra issued a circular dated 2nd, May 2000, whereby in order to take complaints of adulteration, the inspecting officials will first test the quality of product and density at the retail outlet and only if density is not found in order, then sample should be drawn. Clause 5(i) of the 1998 Control Order empowers the officer authorised to take samples from the tank including underground storage tank, nozzle of the petrol dispersing pump, vehicle and receptacle. The above provision is arbitrary and unacceptable. The tanker lorries carries different kinds of petroleum products at different times and they are not properly cleaned and that affects the quality of petroleum products. There is much scope for adulteration of petrol/HSD in the tanker during transit. The sealing procedure of tanker lorries are neither fool proof nor pilfer proof; there is no guarantee that the petrol/HSD supplied to the petrol/HSD bunk is manufactured to the specification prescribed and

transported to the dealer and delivered with same purity. The petrol which is received by the dealers at the bunk may not conform to the standards prescribed under Schedule-1 of the Control Order. Therefore, in the year 1993, the Oil Industry passed an order that if the product passed the density test at the dealer's outlet, that samples failed in the sample test, the entire product should be taken back by the company and substituted with fresh product. The 1998 Control order was amended in 1999 by which the Octane requirements, the Research Octane Number (RON) has been taken away. But, at the same time, for arriving at Octane requirements, by Antiknock index has to be conducted. Therefore, to know the Octane Number, RON test has to be conducted. But, the dealers have no facility to do that in their retail outlet. Under Clause 3(iii) of the Control order, the dealers required to inspect the lorry tankers in which they received the products and ensure that the seals of the tankers are not tampered with. It is also required to ensure the quality of the petrol and conform whether the same is as per requirement under Schedule-1. If the petrol bunk dealer is to conform the quality, he has to send the samples of each lorry load to laboratory and it will take at least 7-15 days to get a report. Further, it is much expensive which the dealer cannot offer. Till such time the tanker lorry will have to be kept idle in the petrol bunk. For Anti-knock index test, the sample has to be sent to the special laboratory. Drawing of sample itself is a technical exercise that cannot be done by a person who is not properly trained. On an average, 2-3 lorry tankers arrived at the bunk every day. The dealer is required to maintain samples taken from every lorry/tanker. The indefinitely storing such samples is hazardous.

(ix) As per 1998 Control Order, the presumption is drawn that the petrol supplied the petrol bunk dealers is in accordance with the specifications under schedule-1. Such a presumption is unjustified, especially when the consequences arising out of such presumption is disastrous to the petrol bunk dealers. Entrustment of petrol as per schedule-1 specification should first be ensured without which the petrol bunk dealers cannot be called to answer to the quality and composition of the petrol as per said schedule-1 and suffer severe punishments. Such a procedure is illegal and unconstitutional. Therefore, the 1998 Control Order is opposed to law and illegal and violative of the provisions of Constitution. Even if the petrol bunk dealers have not done any adulteration, there is every possibility for adulteration either during the course of manufacture or transportation from the manufacturer to the Oil Companies or at the storage point or during transportation from the Oil companies to the retail dealers. In all cases, ultimately the retail petrol bunk dealers are held responsible and punishable. The Control Order leaves all others unanswerable as if they are all paragons of virtue. Such a classification is a discrimination and violative of Article 14 of the Constitution of India. The Control Order gives room for whimsical interference and prosecution by authorities. Therefore, the writ petition for a writ of mandamus directing the respondent to provide infrastructural facilities to enable the dealers to ensure the quality and quantity of product delivered at their bunks and to direct respondents 2 to 5 to disclose in their delivery documents, the analytical report of the products supplied.

4. (i) In the counter filed by the second respondent, all the averments made by the petitioner are denied. It is stated further that

Similar contentions were raised by the various lessees of the Oil company, who had challenged the cancellation of their respective licenses in WP.Nos.3528 to 3533 of 2000, and the same was agitated in Writ Appeal by the second respondent; the Division Bench of this Court negatived the same and held that the contract in question entered into between the Lessees and Oil Companies were not statutory in nature and since the contract provides for arbitration, they could go for arbitration and the writ petitions were not maintainable. When the individuals failed in their attempt, the association cannot agitate the same issue as it has no independent existence dehors its members. The only difference now is it projects the Control Order issued under Essential Commodities Act. When a contract has been concluded between the parties, it will not be open to one of the parties to challenge the rules which govern the contract. Inasmuch as it has been held by the two Division Benches of this Court, the licensees will have to seek their remedy only by way of arbitration. Even when the dispute relates to the quality of petrol supplied to the licensees, the writ petition is not maintainable and the association is bound by the principle of constructive Resjudicata as well as Estoppel.

(ii) Without prejudice to the above preliminary objection, on merits also the averments that Clause 3(iii)(b) and 5(1) of the Control Order are ultra vires are not correct. The Essential Commodities Act has been included in the IX Schedule to the Constitution and therefore it cannot be challenged on the ground of violation of the provisions of Part III of the Constitution of India. The Control Order can only be challenged as ultra vires of the Provisions of the Act. The Essential Commodities Act and the Control Order passed therein are measures taken to maintain the quality as well as the supply of the Essential Commodities. There is no arbitrariness in Clause 3(iii)(b). The Motor Spirit is supplied from refineries to tankers of the respective Oil companies by dedicated pipe lines. For petrol exclusive pipelines are used. There is no question of petrol being mixed with diesel. The Refineries bring out the products in batches and they give a certificate to the purity as per Schedule-1. One batch of petrol is received by one of the Oil Companies. The Oil companies after receipt of supply from the refineries give its own batch number. The companies have their own laboratory at Chennai and periodically tests the product at random basis. There is no possibility of adulteration due to transporting petrol/diesel alternatively; because in such cases, when the compartment is emptied nothing will be left behind. The compartment in the tanker are so designed that when it is drained off at the delivery point nothing will be left in the compartment. Despite that there are guidelines when the product is filled under such circumstances. In case where petrol is to be carried by a tanker which previously carried diesel or kerosene, the tanker is fully cleaned and only after satisfying that the tanker does not have any trace diesel or kerosene, petrol is filled up.

(iii) In so far as the sealing the containers, there is no approved sealing system to be adopted by the Oil Company. Only by trial and error method and out of practical experience, the sealing procedure has been devised from time to time. If the seal put by the company is tampered with, it can be easily detected and when the seal is not in tact and the dealers suspect that it has been tampered with, the dealer can return the product. After the product is delivered to the licensees, they alone is responsible for the quality of the product and the product is supplied strictly in accordance with the requirements. Before receiving the delivery, they should collect a sample

and if on testing if the product was found adulterated, he can proceed against the truck operator who is liable for such adulteration. The licensee is bound to check every day and record the contents of the tank in the premises of the licensee. Whenever malpractice of the transporters come to the notice of the Oil Company, they take action and they blacklist the contractors and once they are blacklisted, information is sent to the other Oil companies and they also do not supply to them. The dealers cannot be provided with fulfledge laboratories for analysing the composition of the products. Hence, the density checks only are recommended. Before the commencement of the daily sales, they have to record the density in the register. When a dealer receives a load of petrol or diesel in a tanker/lorry, the licensee is required to carry out the density test by drawing samples from the lorry. The product are released only after analysis and certification by the lab that it is as per the prescribed specification. It is not possible for the Oil companies to have a laboratory in the premises of each of the licensee.
(iv) Similar counter affidavit has been filed by the third and fourth respondents.
(v) In the Additional counter affidavit it is stated that in order to ensure quality of the petroleum products, the companies have devised foolproof sealing procedure by introducing the security locking system called "ABLOY-LOCK system. This locking system has over 360 million key combinations with multiple security levels. The duplication of keys is practically not possible. Optimum resistance of locks against physical attack is assured. The movement of master key is continuously monitored. This system ensures the supply of tamper free quality product to the retail outlets.

5. The learned Senior counsel Mr.G.Masilamani appearing on behalf of the petitioner submitted that the crude oil refined by the Government companies and from that the Motor spirit and High Speed Diesel, kerosene and other by-products are separated and the Motor spirit are supplied by the Oil companies fully owned by the Government supplied to the members of the association. Because the oil companies are owned by the Central Government, it is presumed that the product that is supplied is of standard quality conforming to the specifications found in Schedule-1 of MS & HSD Control Order 1998. But the presumption is not correct. At the retail outlets petrol and diesel are delivered through the vehicles/tankers under the control of the oil companies; they have this vehicles under lease. The oil companies entered into contract with the lorry/tanker owners for transportation of the petroleum products. The lorries/tankers are under effective control of the oil companies. The petitioners are not permitted to send their own vehicles to take delivery of the product directly from the oil companies. From the refineries, the oil companies get the product through pipelines. The same pipeline is used for getting petrol as well as diesel from the refineries. In that process, the petrol that is received with the storage tankers of the oil companies cannot be to the specifications of schedule-1 of the MS&HSD Control Order 1998, while getting through the very same pipelines in which diesel is also received. There is every possibility for mixing up of petrol or diesel even when it is received by the oil companies in their storage points. Further the lorries/tankers used for transporting the products to the retail outlets are also interchangeable. The lorry which is used for transporting of diesel or kerosene is used for transporting petrol also. Therefore, in this

process also there is every possibility for mixing up diesel or kerosene with the petrol and therefore, the specifications of schedule-1 of MS&HSD Control Order,1998 cannot be complied with. Further during the transit of the product by lorries/tankers from the storage point to the retail outlet many things happened in between. Therefore, there is no assurance that the product that is delivered by the oil companies to the retail outlets as per the specifications of schedule-1 of MS&HSD Control Order 1998. But, at the same time the outlet dealers are required to ensure the quality as found in schedule-1 of the MS&HSD Control Order,1998 and the outlet dealers are required to take only three tests, namely Colour, Odour and Density. It is common knowledge that many products other than petroleum products also have the same density as that of petroleum products. Therefore, merely because the density is same, there is no guarantee, that the product conform to the specifications. Similarly, there are many colourless liquids when mixed cannot be identified at the retail outlets and there are many odourless liquids. Therefore, by merely conducting these tests, it cannot be ensured that the product conforms to the standards prescribed in the Schedule-1 of HS & HSD Control Order 1998. Therefore, Clause 3(iii)(b) as well as Clause 5(1) of the MS&HSD Control Order 1998, the provisions cannot be complied with by the retail dealers. Therefore, Clause 3(iii)(b) is not possible for compliance and there are no facilities available for the retail dealers to ensure the quality of petrol as per the specifications under Schedule-1 of MS&HSD Control order 1998. Hence, those provisions cannot be enforced against the petitioners' association. Because that would amount to enforcing a provision which is impossible for compliance and law does not require the person to comply with impossibilities; the law does not expect impossibilities to be performed by the individuals. Therefore, the provisions of Clause 3(iii)(b) and 5(1) are ultra vires and hence unenforceable.

6. The learned counsel for the petitioner further submitted that if the authorities wanted to enforce these provisions against the retail dealers, then proper and sufficient infrastructures must be provided at the retail outlets. That is, the retail outlet must be given equipment to ensure the quality of the petrol supplied to them at the delivery point. Unless and until such facilities are provided, this provision cannot be enforced and for violations of the provisions of the Control order, the retail outlets cannot be punished. Inasmuch as under Section-7 of the Essential Commodities Act, any violations of the Control Order is also punishable with imprisonment, the law becomes unreasonable and unenforceable in so far as the retail outlets are concerned. Even the delivery bill does not contain a declaration that the product that is supplied conform to the specifications of schedule-1 of MS & HSD Control Order,1998. When that be the case, the retail dealers are unreasonably expected to maintain the quality of the petrol.

7. Even the locks that is provided is tampered with and there is no guarantee that it cannot be tampered en route. Therefore, the petitioners' association are entitled for a writ of certiorari that Clause 3(iii)(b) and Clause 5(1) of the MS & HSD Control Order,1998 are ultra vires in so far as it requires the members of the petitioners' association to ensure the quality of the product as per schedule-1 of the HS&HSD Control Order 1998, and also they are entitled for a writ of mandamus directing the respondents to provide

sufficient infrastructure facilities in each and every retail outlet to test the product that is supplied at the retail outlets.

8. The learned Additional Solicitor General Mr.V.T.Gopalan appearing for the respondents submitted that a similar writ petitions were filed earlier by the licensees of the retail outlets for the very same relief and the Division Bench of this Court has dismissed all those writ petitions and that Judgment is reported in Union of India Vs. Sri Gayathri Agencies (2000(IV)CTC 711). Under these circumstances, for the very same relief these writ petitions have been filed through the petitioner association. When the individual members of the association cannot get the relief and the Court rejected their claim, the petitioner association representing the very same persons cannot seek the very same relief in the subsequent writ petitions.
9. The learned Additional Solicitor General further submitted that if there is violations of the conditions of the agreement between the retail outlets and the oil companies, the agreement provides for arbitration. The parties are free to initiate arbitration proceedings in case of violation of the agreement and the case reported in Hindustan Petroleum Corporation Ltd., Vs. Pinkcity Midway Petroleum ((2003)6 SCC 503), the Supreme Court has held that for any violations of the agreement between the oil company and retail outlet, arbitration is the only remedy. Therefore, the present writ petitions filed by the petitioner's association are to be dismissed.

10. Further, the Additional Solicitor General also submitted that the Control Order cannot be challenged except on the ground that it exceeds the deligated power or there is a lack of legislative competency. The control order passed exercising the power under Section-3 of the Essential Commodities Act which has been included in the IXschedule of the constitution. Therefore, the provisions of the Essential Commodities Act cannot be challenged on the ground it violates any of the fundamental rights. Impossibilities of performance cannot be a ground to hold that the provision of the control order is invalid and unenforceable.

11. In the counter filed by the second respondent the procedure of sealing has been elaborately stated. When adopting this method of sealing Obloy-lock which is the latest technology in the locking system is used. The possibility is almost Nil to counterfeit or to tamper with. Therefore, the sealing procedure adopted presently is a foolproof system that ensures the quality of the petroleum product that is delivered at the retail outlet.
12. Clause-25 of the agreement provides "a receipt singed on behalf of the dealer at the time of delivery by the Corporation of the Petroleum products will be a conclusive evidence that the petroleum products is in fact delivered to the dealer and such products are in accordance with the specifications thereafter mentioned here under ....." Therefore, it is sufficient for the dealers to show that they are selling only the product as received from the oil companies. When that is done, no action under the Essential Commodities Act can be initiated against them. Therefore, that is the sufficient safeguard for the retail outlets. Further, the learned Additional Solicitor General relied upon the decision in Krishnakumar and another Vs. Sr Superintendent of Police, Bulandshahr and others (1998 AIHC 4581), and also referred to the decision in Delhi Petrol Dealer Association

and another Vs. Union of India and others (1999 DLT 400), where the validity of the control order was upheld. In the first case, the Allahabad High Court has held as follows:
"Government Corporations are not expected and will not supply substandard or adulterated material and it can be presumed that the product supplied by them would be pure and would conform to the standards laid down by the Indian Standards Institution. The dealer is only required to maintain the product in the same condition in which he had received it. There is no compulsion on anyone to get a dealership of petrol or diesel. Anyone who wants to be appointed as a dealer of an oil company does so by his own choice and after becoming a dealer he cannot be heard to complain that the control order by which he is governed does not give him a second opportunity to get the sample analysed again."
Therefore, the court held the dealers cannot complain that it violates Article 21 of the Constitution of India.

13. Relying upon this decision, the Additional Solicitor General submitted that the retail dealers cannot complain that they are compelled to enter into agreements which are onerous and therefore, contention that the Control Order cannot be enforced against them, is not acceptable.

14. The learned counsel Mr.Kumar appearing for the respondents 3-5, Oil companies, submitted that the product is defined under the Control Order which means the petroleum as specified in schedule-1. Inasmuch as the Bureau of Indian Standards is an Act enacted by the Parliament and because the oil companies are owned by the Central Government, the quality of the product supplied by those oil companies to the retail outlets cannot be assailed. Further in the delivery documents filed in the typed set, the time at which the lorry or tanker leaves the storage point is also specified. Therefore, if the tanker reaches the delivery point, after an inordinate delay,the dealer could return the product if he doubts that it had been adulterated en route. The provisions of Clause 3(iii)(b) can be satisfied, if the retail outlet dealers check and ensure that the seals are intact and they can also conduct filter paper test and furfural test. To do that test, facilities are available at the outlet itself. Further the dealer could collect the samples from every tanker and test it whenever he gets doubt. Therefore, it is very much possible to comply with the provisions of the HS&HSD control order 1998.

15. The argument of the learned counsel for the petitioner is that the tankers are interchangeable for transporting diesel and petrol and therefore there is possibility of the petrol being adulterated. He referred to the counter affidavit filed by the companies and submitted that though not many such instances occur still when a tanker which was used for carrying diesel or kerosene on the previous occasion is used for transporting petrol subsequently before the petrol is filled up. The oil companies ensure that the tank is completely washed off and drained. Therefore, the argument that because the same tanker is used alternatively for carrying petrol, diesel and kerosene, the quality gets affected is not correct. The presumption raised by the control order cannot be assailed as the petroleum products are received from the refineries which constantly regulate and maintain the quality of the products. Therefore, the argument of the learned counsel for the petitioner

cannot be accepted. For transporting the product from the refineries to the storage point, separate pipelines are used for transporting petrol and diesel. By separate pipelines petrol is transported and by another pipeline diesel and kerosene are received. Therefore, there is no possibility of mixing up of petrol with diesel or kerosene at the storage point.

16. With respect to the argument that there cannot be any presumption in favour of the Central Government and the oil companies that always supply quality products, it is sufficient to state such a presumption can be made if the acts so provides for. When Act states that certain presumption shall be made, it is the legislative intent; such a presumption can be made and there is no illegality in making such presumptions. Therefore, that argument of the learned counsel for the petitioner is also not acceptable.

17. In reply to the arguments of the learned counsel for the respondents, the Senior Counsel Mr.Masilamani submitted that when it is admitted that the tanker lorries are interchangeably used, there is always the possibility of adulteration when the container is not cleaned properly before filled with the petrol, the possibility can never be ruled out. Further, it may be ensured that if the three tests referred to by the petitioner namely Colour, Smell, density are satisfied, then the retail outlet shall not be prosecuted; if they are assured of that safeguards they have no grievance. Further, he submitted that the bills that is sent by the lorries shall also contain a statement that the product is in accordance with the specifications of schedule-1 of the HS & HSD Control Order. But, there can never be a presumption that the products supplied by the oil companies always conforms to the specifications.

18. The point that is to be decided in these matters is that whether the provisions of Clause 3(iii)(b) and Clause 5(1) of the Control Order are ultra vires. As rightly contended by the learned Additional Solicitor General, the validity of the provisions of the control order can be challenged as ultra vires only if the control order exceeds the power delegated to the executive by the Act. Unless it is proved that the control order exceeds power conferred on the Government by the statute, the validity of the provisions of the control order cannot be challenged. The argument advanced by the learned counsel for the petitioner is that the provision of Clause 3(iii)(b) and 5(1) are impossible for compliance by the retail outlets and therefore on that ground it has to be held as ultra vires. Again as contended rightly by the Additional Solicitor General impossibility of performance or difficulty to comply with the provisions cannot be a ground to hold that the provisions are unconstitutional or unenforceable. When the control order requires certain compliance and such control order is legally valid and does not suffer from legislative incompetency, then the requirement of the control order shall be complied with. Difficulty in complying with the provisions is not a ground to hold that the provisions of the control order is illegal or unenforceable. Inability of performance is not a ground for invalidating the law.

19. The learned counsel for the petitioner's Association submitted that they are not sure about the quality of the product that is delivered at

their retail outlet. As per the terms of the agreement, the delivery of the product is made only by the tankers possessed by the oil companies. The retail outlets have no other option; they are not permitted to bring in their own vehicles. The learned counsel appearing for the respondents 3-5, submitted that if the retail outlet suspects any adulteration due to the fact that it is received long time after it left the place of origin. then it can always return the product to the oil companies. In reply to that by the learned counsel for the petitioner stated that it is not always possible to return the product for the consequences that may follow. If the retail outlet return the product once, then the oil companies will not deliver another lorry/tanker immediately and ultimately their business would suffer. This argument of the learned counsel for the petitioner may have some truth for that other remedies are available. On that ground the contention that they must be exempted from the consequences, cannot be accepted. Clause 3(iii)(b) of the Control order provides that the dealer/consumer shall inspect such containers or oil trucks in which he received the product to ensure (a) that the container or truck including seal are not in any manner tampered with. (b) that the quantity and the quality of the products are as per delivery documents issued by the oil companies and the quality of the product conforms to the requirement enacted in Schedule-1 on the control order. For this purpose, the dealer/consumer shall maintain a record of density as enacted in Schedule-1 and keep the samples of product or take such other measure as prescribed by oil companies.

20. Further Clause-(V) reads "no person shall sell or agrees to sell any petroleum products or its mixture other than motor spirit or High speed diesel as specified in Schedule-1 in any form, under any name, brand or nomenclature which is meant to be used as fuel in spark engines." Therefore the Control Order compels that the dealer shall inspect such containers by which he receives the product to ensure the quality and quantity and for that purpose, the retailer shall maintain a record of densities as indicated in the schedule. The control order provides that no person shall sell a petroleum product which is not in accordance with the specifications found in schedule-1. Therefore, the control order requires that the retail dealer shall ensure the quality of the petroleum product that he shall not sell any adulterated products which does not conform to the specifications of the schedule-1. Therefore, the dealer also have the duty and responsibility to ensure the quality of the petrol; this responsibility is imposed on him by the statute passed by the Parliament. Therefore, if any person wants to sell the petrol product in the retail outlet, he shall ensure the requirements of the control order. If any person is of the view that he cannot comply with these provisions, it is always open for him to go out of the business. Therefore, when the Act provides, or when the Act compels a person to do certain acts in a particular manner, such person has to do it in the same manner. The act may compel compliance. That it is impossible to comply with the conditions specified in the schedule is no excuse. When the retailers enter into an agreement, they did so with open eyes. After entering into the agreement, they cannot complain that the conditions of the agreement are one sided and that it cannot be complied with. In such circumstances, it is for the retail dealers to cancel those agreements; But as long as the agreement is in force they are bound to comply with the provisions of the agreement.

21. If for any reason, the retail dealers do not want to get the supply of the product through the tankers possessed or engaged by the oil companies, it is open for them to send their own tankers to get the product directly from the outlets of the oil companies. When a question was put to the Additional Solicitor General and the counsel appearing for R3 to R5, as to whether there is any impediment or difficulty for the retail dealers in getting the supply directly from the oil companies through their own lorries/tankers, they replied that there is absolutely no difficulty. The Additional Solicitor General further stated that even though the oil companies get the lorries for transportation of petroleum products to various outlets by entering into contract by calling for tenders from the owners of the lorries, they have no objection for any retail dealer to get the supply directly from the outlets of the oil companies. But, he submitted that it is not always possible for all the retail outlets to send their own tankers to get the supply from the oil company directly.

22. From what is stated by the learned Additional Solicitor General and the counsel for R3 to R5, the retail outlets, if they so desire, may get the supply directly from the oil companies through their own tankers. They can make an application to th ffect either individually or collectively by a few retail outlets, (since it is stated it is not always possible for all the retail outlets who do not own lorries/tankers) such applications may be ordered; and thereafter, the retail outlets can get supply directly from the oil companies through their own lorries either owned or taken on lease by them. It is not impossible for a few dealers to come together amongst themselves and engage a few tankers and lorries for the purpose of getting the petroleum product from the oil companies exclusively for them. By making such provisions, those retail outlets who entertain a suspicion that the products that are delivered to them do not conform to the specifications, would also be cleared. It is also in the best interest of the public at large that all persons involved in the sale of petroleum products take the responsibility of supplying quality petroleum products.

23. It is common knowledge that in some petrol bunks adulterated product is sold with impurity and the fault is not always on the retail outlets. Even in such cases, they are liable for prosecution and imprisonment under Section-7 of the Essential Commodities Act. They are entitled to protect themselves from such prosecutions. By allowing the retail outlet to get the supply directly from the storage point, without the involvement of another middle person who transport the product from the storage point to the retail outlet, the possibilities of adulteration en route gets eliminated. The quality of the product can be ensured by getting the supply through their own tankers directly from the oil companies. Even under such circumstances, if the retail outlet suspects the quality of the petroleum product that is supplied to them even at the storage point, they can always get the samples tested by the appropriate laboratory. By this method, the retail outlets can safeguard their own right and avoid prosecution as well as prevent adulteration of petrol en route. The Oil companies need not provide the costly testing equipment at each retail outlet. All these would ultimately be for the benefit of the entire public. All the persons involved in the trade of vending petroleum product to the actual consumers would take the

responsibility of vending quality products to the ultimate beneficiaries and the public will get quality petroleum products; this would go a long way to protect the environment also.

24. Coming to the prayer in these writ petitions, the same relief had been claimed the Division Bench of this Court, had already decided to issue in the writ petitions filed by the individual owners of the retail outlet; but the prayer was rejected in Union of India Vs. Sir Gayathri AGencies (2000(4) CTC 711). When th e petitions filed by the owners were dismissed, the association acting on behalf of all the owners cannot maintain these writ petitions. Therefore, these writ petitions are liable to be dismissed on that ground alone. Further also for the foregoing reasons, the writ petition praying for a writ of certiorari that Clause 3(iii)(b) and Clause 5(1) of the control order is ultra vires has no merit. Hence, the writ petition praying for the writ of certiorari cannot be granted and it is liable to be dismissed.

25. It is made clear that the members of the petitioner association are entitled to transport petroleum products by their own lorries directly from the oil companies. They cannot be compelled by the oil companies that they must get the supply through the lorries engaged by the oil companies, when they suspect adulteration of the product en route. When any request is made by the retail outlets either individually or collectively that request shall be complied with by the oil companies and the oil companies cannot insist that product would be supplied only through the tankers engaged by them.

26. The prayer in W.P.No.13336 of 2000 is for a writ of mandamus to provide sufficient infrastructure for testing the quality of the product in the retail outlet. Inasmuch as the retail outlets care take delivery of the products at the storage point itself and can transport the product in their own tankers, the suspicion that the product gets adulterated en route gets eliminated. Therefore, there is no need for providing the facilities for testing in the retail outlets. In case the dealers have any doubt that the product that is supplied at the storage point does not conform to the standards prescribed under Schedule I of the control Order, that can be tested at the storage point itself by a request and taking a sample then and there. Under the Control Order the oil companies have no duty to provide for such facilities at the retail outlets. Therefore the writ of mandamus cannot be issued. The retail outlets are bound to take all steps as required by the Control Order.

27. In the result, with the above observations, both the writ petitions are dismissed. No costs.

Index: Yes
Internet:Yes

ksr

To

1. Union of India
rep. by its Secretary
Ministry of Petroleum and Natural Gas
Govt. Of India, Shastri Bhavan
New Delhi